

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOB'S DAUGHTERS INTERNATIONAL,

Plaintiff,

v.

HEIDI YOAST,

Defendant.

HEIDI YOAST,

Counterclaim-Plaintiff,

v.

JOB'S DAUGHTERS INTERNATIONAL,  
SHELLY COLE aka SHELLY HOWRIGON,  
an individual, ROD REID, an individual,

Counterclaim-Defendants.

NO. 16-cv-1573-RSL

PLAINTIFF'S REPLY IN FURTHER  
SUPPORT OF ITS MOTION IN LIMINE

Noting Date: May 18, 2018

Plaintiff, Job's Daughters International ("JDI"), respectfully submits this Reply Brief in further support of its Motion in Limine and in response to Defendant's Opposition (Docket No. 76).

I. Testimony of Yoast's Treating Medical Provider Should Be Excluded or, at a Minimum, Limited.

Defendant asserts Linda Johnston, ARNP ("Johnston") should be considered a "treating

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physician” and that because her testimony would be limited to that of a fact witness regarding patient treatment over the years, an expert report was not necessary. To the extent Johnston is permitted to testify as a fact witness, her testimony must be limited only to her “observations based on personal knowledge,” and she cannot provide her professional opinion “about what caused any symptoms [she] may have observed in defendant” because this would constitute expert opinion testimony. *See Glein v. Matty*, No. C00-908P, 2001 WL 36101368, at \*1 (W.D. Wash. June 7, 2001) (finding treating physicians would not be precluded from testifying about what they observed but would not be permitted to offer opinion testimony about the cause of the observed symptoms). Because Defendant acknowledges Defendant has not retained any experts to testify, Plaintiff respectfully requests an Order from this Court confirming the same and limiting Johnston’s testimony to only that of her observations based on personal knowledge.

## II. Social Media Posts by Non-Witnesses Used to Establish the Truth of the Matter Asserted

“[Fed. R. Evid.] 801(d)(2)(C) provides that a statement is a non-hearsay party admission if it ‘is offered against a party and is ... a statement by a person authorized by the defendant to make a statement concerning the subject.’” *United States v. Bonds*, 608 F.3d 495, 502 (9th Cir. 2010). Rule 801(d)(2)(D) of the Federal Rules of Evidence further provide that a statement is not hearsay if “it is offered against a party and is ... a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment... .” *Bonds*, 608 F.3d at 502.

Here, Hoglund is not an agent or employee of JDI, therefore, any statements made by

Hoglund are not an admission by a party opponent because Hoglund is not a party to this case. As Defendant states, “Ms. Hoglund was serving as ‘Grand Guide’ – defined as an elected member of the **Grand Guardian of the state of Virginia...**” (Dkt. 76, p.5). Neither Hoglund nor the Grand Guardian Council of Virginia are parties to this case and there is no admissible evidence that could establish Hoglund as an officer, employee, or agent with the authority to speak on behalf of JDI. In fact, despite numerous depositions of JDI representatives and of JDI, Defendant failed to establish that Hoglund’s affiliation with the Grand Guardian Council of Virginia in any way made her an agent or have any authority to speak on behalf of JDI. This is her burden. Although not developed by Yoast, the Grand Guardian Council of Virginia is subordinate body to the Supreme Guardian Council of JDI. The Bylaws are clear that the Supreme Guardian Council is vested with the power to legislate for and on behalf of the JDI Order, all subordinate bodies derive their power from the Supreme Guardian Council, and that the Supreme Guardian Council does not control, manage or operate the day-to-day decisions and activities of the subordinate bodies, including the Grand Guardian Councils. As such, Hoglund’s statements are not an admission of the Supreme Guardian Council or JDI. Plaintiff, therefore, respectfully requests an Order from this Court precluding social media posts from non-witnesses, including Hoglund.

### III. References to Discussion between Counsel, Including Settlement Discussions

Defendant acknowledges Plaintiff’s argument that Rule 408 of the Federal Rules of Evidence preclude the reference to settlement discussions to show the liability of the claim. Defendant fails to address, however, Plaintiff’s argument that additional discussion between counsel should be excluded because they are not relevant to the claims and constitute

1 inadmissible hearsay. Furthermore, Plaintiff's argument that the probative value of such  
2 evidence is substantially outweighed by the danger of unfair prejudice and misleading the jury  
3 goes completely unanswered by Defendant. Such evidence should be excluded because it is  
4 not relevant, constitutes inadmissible hearsay, will mislead the jury, and any probative value  
5 will be substantially outweighed by the danger of unfair prejudice. JDI respectfully requests an  
6 Order confirming the same.  
7

8 IV. Evidence Pertaining to How JDI Handles Inquiries and Requests for Permission to Use  
9 JDI's Trademarks

10 The way in which JDI handles inquiries and requests for permission for use of its  
11 trademark is of no consequence to the issues at hand because it is undisputed that Defendant  
12 never sought such permission and never made such an inquiry. Therefore, the manner in which  
13 JDI handles the inquiries made by others has no bearing on the issues of this case. Whether or  
14 not Defendant's failure to seek permission to use JDI's marks was 'reckless' or 'extraordinary'  
15 is not based upon the manner in which JDI handles inquiries and requests for permission made  
16 by others. Whether Defendant's actions were 'reckless' or 'extraordinary' is, instead, based  
17 upon the fact that Defendant simply failed to seek such permission or verify that others  
18 requesting her to create goods utilizing the JDI Marks had. Plaintiff's motion as to these facts  
19 should be granted.  
20

21 V. Testimony from Witnesses and/or Evidence Not Timely Disclosed

22 Defendant bears the burden of providing evidence to support its counterclaims against  
23 Plaintiff. Defendant attempts to shift this burden by contending that its response to Plaintiff's  
24 Second Set of Interrogatories stating that "any and all JDI member and volunteers present at  
25

1 the ‘Board of Trustees’ Town Hall Meeting’ were potential witnesses” was sufficient to meet  
2 her obligation to provide Plaintiff with the identity of witnesses with knowledge of the events  
3 in question. Rule 26 of the Federal Rules of Civil Procedure, however, requires the disclosure  
4 of the **identity** of witnesses. To claim Plaintiff should have known because it had information  
5 that these the countless attendees of the Town Hall Meeting were potential witnesses places too  
6 heavy a burden on Plaintiff to determine who has information relevant to Defendant’s  
7 counterclaim.  
8

9 Although Defendant specifically identified Ferlet as a witness with information  
10 regarding permission from JDI, Defendant did not identify her as a witness with evidence  
11 regarding the counterclaim or the statements allegedly made at JDI’s 2016 Supreme Session.  
12 Defendant’s failure to disclose the identity of witnesses, including Hoffman and Ferlet, in a  
13 timely manner harmed Plaintiff in that Plaintiff did not get the opportunity to depose these  
14 witnesses and/or identify rebuttal witnesses or testimony. Furthermore, with regard to Leeper,  
15 because Defendant contends that Leeper’s testimony will only be used to rebut any attempt to  
16 discredit Ms. Hoglund’s inadmissible hearsay testimony, Leeper’s testimony should be  
17 excluded, even if she had been timely disclosed. Finally, with regard to the profit and loss  
18 statements, while Plaintiff appreciates that Defendant is a sole proprietor, this does not mean  
19 Plaintiff should be prejudiced against because Defendant could not provide relevant evidence  
20 in a timely manner. Again, because the profit and loss statements were provided after the  
21 discovery cutoff, Plaintiff did not have the right to depose Plaintiff on the same as to remaining  
22 deficiencies.  
23  
24  
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1 Plaintiff would be unfairly harmed if the evidence and testimony Defendant failed to  
2 timely disclose were allowed. The testimony of the witnesses and evidence that were not  
3 disclosed within the discovery deadlines agreed to among the parties and confirmed by Order  
4 of this Court should be excluded.

5  
6 **CONCLUSION**

7 For the aforementioned reasons, JDI respectfully requests this Court grant its motion in  
8 limine and exclude evidence and testimony during the jury trial of the above captioned matter  
9 relating to (a) any expert opinion(s) and limiting the testimony of Johnston to only that of her  
10 observations based on personal knowledge; (b) any social media posts made by non-parties or  
11 witnesses, and specifically Leslie Hoglund, offered for the truth of the matter asserted;; (c) any  
12 insurance policies JDI may carry; (d) any discussions between counsel, including settlement  
13 discussions; (e) personal opinions of counsel regarding evidence; (f) how JDI handles inquiries  
14 and requests for permission to use JDI's trademarks from third-parties; and (g) any documents  
15 or testimony from witnesses not timely identified.

16  
17 DATED this 18<sup>th</sup> day of May, 2018.  
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25

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CERTIFICATE OF SERVICE

I hereby certify that on May 18th, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

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